

1995

State of Utah v. Woolley : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Marcy C. Corporon.

James H. Beadles; Jan Graham; James M. Cope.

Recommended Citation

Brief of Appellee, *State of Utah v. Woolley*, No. 950226 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6560

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee

v.

PAUL EDWIN WOOLLEY,

Defendant/Appellant

Priority No. 2

Case No. 950226-CA

BRIEF OF APPELLEE

AN APPEAL FROM THE TRIAL COURT'S DENIAL
OF DEFENDANT'S MOTION TO WITHDRAW HIS
PLEA OF GUILT TO ONE COUNT OF KIDNAPPING,
A SECOND-DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-3-301 (1995), IN THE THIRD
JUDICIAL DISTRICT COURT FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE
ANNE M. STIRBA, PRESIDING

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 950226

JAMES H. BEADLES (5250)
Assistant Attorney General
JAN GRAHAM (1231)
UTAH ATTORNEY GENERAL
124 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

MARY C. CORPORON
Corporon & Williams
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101

JAMES M. COPE
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

ATTORNEY FOR APPELLANT

ATTORNEYS FOR APPELLEE

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

FILED JUL 27 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee

v.

PAUL EDWIN WOOLLEY,

Defendant/Appellant

Priority No. 2

Case No. 950226-CA

BRIEF OF APPELLEE

**AN APPEAL FROM THE TRIAL COURT'S DENIAL
OF DEFENDANT'S MOTION TO WITHDRAW HIS
PLEA OF GUILT TO ONE COUNT OF KIDNAPPING,
A SECOND-DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-3-301 (1995), IN THE THIRD
JUDICIAL DISTRICT COURT FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE
ANNE M. STIRBA, PRESIDING**

JAMES H. BEADLES (5250)
Assistant Attorney General
JAN GRAHAM (1231)
UTAH ATTORNEY GENERAL
124 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

MARY C. CORPORON
Corporon & Williams
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101

JAMES M. COPE
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

ATTORNEY FOR APPELLANT

ATTORNEYS FOR APPELLEE

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
ISSUES ON APPEAL AND STANDARD OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE	2
Procedural history	2
Statement of facts	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. BECAUSE DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA CAME MORE THAN 30 DAYS AFTER THE ENTRY OF THE PLEA, THE TRIAL COURT DID NOT HAVE JURISDICTION TO REVIEW THE MERITS OF THE REQUEST AND THIS COURT SHOULD AFFIRM THE TRIAL COURT’S DENIAL OF THE MOTION ON THAT BASIS.	4
II. BECAUSE DEFENDANT DID NOT OBJECT TO THE FINE, THIS COURT SHOULD NOT REVIEW HIS CLAIM OF AN ABUSE OF DISCRETION ON APPEAL.	5
CONCLUSION	6
ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED	7

ADDENDA

ADDENDUM A

Relevant statutes

ADDENDUM B

State v. Price, 837 P.2d 578 (Utah App. 1992)

TABLE OF AUTHORITIES

CASES CITED

<u>Olson v. Salt Lake School District</u> , 724 P.2d 960 (Utah 1986)	5
<u>State v. Brown</u> , 856 P.2d 358 (Utah App. 1993)	2
<u>State v. Bywater</u> , 748 P.2d 568 (Utah 1987)	6
<u>State v. James</u> , 819 P.2d 781 (Utah 1991)	1
<u>State v. Jameson</u> , 800 P.2d 798 (Utah 1990)	6
<u>State v. Lopez</u> , 886 P.2d 1105 (Utah 1994)	6
<u>State v. Powell</u> , 872 P.2d 1027 (Utah 1994)	6
<u>State v. Price</u> , 837 P.2d 578 (Utah App. 1992)	4, 5
<u>State v. Snyder</u> , 747 P.2d 417 (Utah 1987)	6

STATUTES AND RULE

Utah Code Ann. § 63-63a-1(1) (1993)	5
Utah Code Ann. § 76-5-301 (1995)	1, 2
Utah Code Ann. § 76-5-404.1 (1995)	2
Utah Code Ann. § 77-13-6 (1995)	1, 3, 4
Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994)	1
Utah R. App. P. 4(e) (1995)	4

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee

v.

PAUL EDWIN WOOLLEY,

Defendant/Appellant

Priority No. 2

Case No. 950226-CA

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from defendant's conviction for kidnapping, a second-degree felony, kidnapping, in violation of Utah Code Ann. § 76-5-301 (1995). Therefore, this Court has original appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

ISSUES ON APPEAL AND STANDARD OF REVIEW

1. When defendant pled guilty on October 3, 1994 and did not file a motion to withdraw his guilty plea until November 28, 1994, was his motion barred by the thirty-day jurisdictional limitation of Utah Code Ann. § 77-13-6 (1995)?

The interpretation of a statute is a question of law, which this Court reviews without deference to the trial court. State v. James, 819 P.2d 781, 796 (Utah 1991).

2. Is defendant's challenge to the \$10,000 fine and mandatory 85 percent surcharge precluded because he did not object to the sentence before the trial court?

State v. Brown, 856 P.2d 358, 359 (Utah App. 1993), states the criteria by which this Court determines waiver.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Relevant provisions are included in the addenda.

STATEMENT OF THE CASE

Procedural history

The State charged defendant with aggravated sexual abuse of a child, a first-degree felony, in violation of Utah Code Ann. § 76-5-404.1 (1995) (R. 5). Six months after he was charged, defendant pled guilty to kidnapping, a second-degree felony, in violation of Utah Code Ann. § 76-5-301(d) (1995) (R. 94). The trial court then informed defendant of the 30-day time period in which to file a motion to withdraw his guilty plea (R. 154). At the plea, Brooke Wells, Salt Lake Legal Defenders', served as defendant's appointed counsel (R. 17). Shortly after entering his plea, defendant asked for different counsel and his current attorney, Mary Corporon, was then appointed (R. 103). Fifty-five days after he pled guilty, defendant filed a motion to extend the time in which to withdraw his guilty plea (R. 106-7). On the same day, he also filed a motion to withdraw his plea (R. 113).

On February 3, 1995, the trial court held an evidentiary hearing to determine whether defendant had good cause to withdraw his guilty plea (R. 159). Defendant testified and the State called Brooke Wells (*id.*). After hearing the testimony, the trial

court concluded that defendant had not shown good cause, denied the motion to withdraw, and sentenced him to an indeterminate term of one-to-fifteen years in prison, a \$10,000 fine, and an 85 percent surcharge (R. 217-26).

Statement of facts

The facts are taken from the probable cause statement (R. 8). On April 13, 1994, defendant was in an apartment in Salt Lake County when an eight-year old boy, H.M. entered. Defendant then shut the door, locked it, and grabbed H.M. by the neck, forcing him into the bedroom. Defendant pulled H.M.'s clothes down to his ankles, forced him onto a mattress face first and began fondling his buttocks. H.M. began to struggle and defendant banged H.M.'s head into a wall and told him to shut up. Defendant's conduct ended when two individuals knocked on the apartment door.

SUMMARY OF ARGUMENT

This Court should not review the merits of defendant's appeal because, due to his failure to request withdrawal of his guilty plea within 30 days, the trial court had no jurisdiction to entertain the merits. The 30 day time limit is jurisdictional and, unlike other jurisdictional deadlines for filing notices of appeal and petitions for certiorari, Utah Code Ann. § 77-13-6 (1995) does not allow for extensions of time after the initial 30 day period. Defendant's challenge to the trial court's imposition of a \$10,000 fine also should be rejected on procedural grounds because he did not object at trial and does not now argue plain error.

ARGUMENT

- 1. BECAUSE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA CAME MORE THAN 30 DAYS AFTER THE ENTRY OF THE PLEA, THE TRIAL COURT DID NOT HAVE JURISDICTION TO REVIEW THE MERITS OF THE REQUEST AND THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF THE MOTION ON THAT BASIS.**

When defendant entered his guilty plea, the trial court told him that he had 30 days to request to withdraw it (R. 154). Because the trial court provided defendant this information, the 30-day time limit in Utah Code Ann. § 77-13-6(2)(b) (1995) became jurisdictional and should have precluded the trial court from considering the merits of the request. State v. Price, 837 P.2d 578, 583-84 (Utah App. 1992). On appeal then, this Court need not decide the merits of defendant's request, but should deny the appeal solely due to the untimeliness of the request. Defendant's motion to extend the time to withdraw his guilty plea does not save the withdrawal request because that motion also was filed after the jurisdictional time limit had expired (R. 106).

Procedurally, the trial court lost jurisdiction to withdraw the plea thirty-one days after defendant entered it, i.e., on November 3, 1994. Section 77-13-6 does not allow a defendant to resurrect jurisdiction by filing a late motion to extend time. Compare Utah R. App. P. 4(e) (1995) (allowing extension of time to file notice of appeal after expiration of thirty days) and Utah R. App. P. 48(e) (1995) (providing extension

procedure for late petitions for certiorari after lapse of thirty days) with Utah Code Ann. § 77-13-6(2)(d) (1995) (not providing for extensions). Therefore, the court did not have jurisdiction over defendant's motion to withdraw his guilty plea despite its holding of an evidentiary hearing and refusal to deny solely on timeliness grounds (R. 218). In Price, this Court specifically held that, because the 30-day time limit was jurisdictional, it could not be waived and, thus, could be raised for the first time on appeal. Price, 837 P.2d at 583; Olson v. Salt Lake School District, 724 P.2d 960, 964 (Utah 1986) (acquiescence is insufficient to confer jurisdiction, which can be raised for the first time on appeal). Because the trial court did not have jurisdiction to entertain the merits of defendant's withdrawal motion, this Court should deny the appeal.

II. BECAUSE DEFENDANT DID NOT OBJECT TO THE FINE, THIS COURT SHOULD NOT REVIEW HIS CLAIM OF AN ABUSE OF DISCRETION ON APPEAL.

On appeal, defendant challenges the trial court's imposition of a \$10,000 fine and the 85 percent mandatory surcharge as an abuse of discretion. Br. of Defendant at 12. Defendant's sentencing occurred immediately after the court denied his motion to withdraw his guilty plea on February 3, 1995 and his current counsel, Mary Corporon, was his attorney (R. 225-26). The court sentenced defendant pursuant to statute, committing him to prison for an indeterminate term of one-to-fifteen years and imposing a \$10,000 fine (R. 225-26). Along with the fine, the court imposed the

surcharge that Utah Code Ann. § 63-63a-1(1) (1993) mandates and restitution (R. 226). Defendant did not object but instead, responded in the negative to the court's question whether anything had been overlooked (id.).

Because defendant did not give the trial court the opportunity to address his objection to the fine, he cannot now raise this issue for the first time on appeal. See State v. Powell, 872 P.2d 1027, 1030 (Utah 1994); State v. Jameson, 800 P.2d 798, 801 n.4 (Utah 1990) (affirming that rule precluding review of issues raised for first time on appeal applies to sentencing hearings); State v. Snyder, 747 P.2d 417, 421 (Utah 1987) (refusing to address issue because defendant did not object to restitution order in trial court); State v. Bywater, 748 P.2d 568, 569 (Utah 1987) (applying to sentencing issues the "longstanding rule" that issues raised for the first time on appeal are waived). Defendant can avoid the consequences of his waiver only if he shows plain error. State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994). However, he has not argued that plain error occurred. Therefore, this Court should refuse to address the merits of defendant's sentencing challenge. Bywater, 748 P.2d at 569.

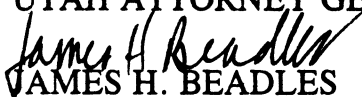
CONCLUSION

Defendant's convictions should be affirmed.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because the facts and arguments are adequately presented in the briefs, and because this case does not present an issue requiring further development or clarification, the State does not request oral argument or publication.

RESPECTFULLY SUBMITTED THIS 27th day of July 1995.

JAN GRAHAM
UTAH ATTORNEY GENERAL

JAMES H. BEADLES
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on the 27th day of July 1995 I caused to be mailed, by U.S. Mail, postage prepaid, two (2) true and correct copies of this ***BRIEF OF APPELLEE*** to:

MARY C. CORPORON
Corporon & Williams
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101

A handwritten signature in cursive script, appearing to read "James H. Beards", is written over a solid horizontal line.

A D D E N D A

A D D E N D U M A

63-63a-1. Surcharge - Application and exemptions.

(1) (a) A surcharge shall be paid on all criminal fines, penalties, and forfeitures imposed by the courts.

(b) The surcharge shall be:

(i) 85% upon conviction of a:

(A) felony;

(B) class A misdemeanor;

(C) violation of Title 41, Chapter 6, Article 5, Driving While Intoxicated and Reckless Driving; or

(D) class B misdemeanor not classified within Title 41, Motor Vehicles, including violation of comparable county or municipal ordinances; or

(ii) 35% upon conviction of any other offense including violation of county or municipal ordinances not subject to the 85% surcharge.

(2) The surcharge shall not be imposed:

(a) upon nonmoving traffic violations;

(b) upon court orders when the offender is ordered to perform community service work in lieu of paying a fine; and

(c) upon penalties assessed by the juvenile court as part of the nonjudicial adjustment of a case under Section 78-3a-22.

(3) (a) The surcharge and the exceptions under Subsections (1) and (2) also apply to all fines, penalties, and forfeitures imposed on juveniles for conduct that would be criminal if committed by an adult.

(b) However, the surcharge does not include amounts assessed or collected separately by juvenile courts for the Juvenile Restitution Account, which is independent of this chapter and does not affect the imposition or collection of the surcharge.

(4) The surcharge under this section shall be imposed in addition to the fine charged for a criminal offense, and no reduction may be made in the fine charged due to the surcharge imposition.

(5) Fees, assessments, and surcharges related to criminal or traffic offenses shall be authorized and managed by this chapter rather than attached to particular offenses.

76-3-301. Fines of persons.

- (1) A person convicted of an offense may be sentenced to pay a fine, not exceeding:
 - (a) \$10,000 when the conviction is of a felony of the first degree or second degree;
 - (b) \$5,000 when the conviction is of a felony of the third degree;
 - (c) \$2,500 when the conviction is of a class A misdemeanor;
 - (d) \$1,000 when the conviction is of a class B misdemeanor;
 - (e) \$750 when the conviction is of a class C misdemeanor or infraction; and
 - (f) any greater amounts specifically authorized by statute.
- (2) This section does not apply to a corporation, association, partnership, government, or governmental instrumentality.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

77-13-6. Withdrawal of plea.

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.
(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.
- (3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

Rule 48. Time for petitioning.

(a) **Timeliness of petition.** A petition for a writ of certiorari must be filed with the Clerk of the Supreme Court within 30 days after the entry of the final decision by the Court of Appeals. The docket fee shall be paid at the time of filing the petition.

(b) **Refusal of petition.** The clerk will refuse to receive any petition for a writ of certiorari which is beyond the time indicated in paragraph (a) of this rule or which is not accompanied by the docket fee.

(c) **Effect of petition for rehearing.** The time for filing a petition for a writ of certiorari runs from the date the decision is entered by the Court of Appeals, not from the date of the issuance of the remittitur. If a petition for rehearing is timely filed by any party, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of rehearing or of the entry of a subsequent decision entered upon the rehearing.

(d) **Time for cross-petition.**

(1) A cross-petition for a writ of certiorari must be filed:

(A) within the time provided in Subdivisions (a) and (c) of this rule; or

(B) within 30 days of the filing of the petition for a writ of certiorari.

(2) Any cross-petition timely only pursuant to paragraph (d)(1)(B) of this rule will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

(3) The docket fee shall be paid at the time of filing the cross-petition. The clerk shall refuse any cross-petition not accompanied by the docket fee.

(4) A cross-petition for a writ of certiorari may not be joined with any other filing. The clerk of the court shall refuse any filing so joined.

(e) **Extension of time.** The Supreme Court, upon a showing of excusable neglect or good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) or (c) of this rule, whichever is applicable. Any such motion which is filed before expiration of the prescribed time may be ex parte, unless the Supreme Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) The number of copies to be filed and served shall be the same as provided in Rule 26.

(Amended effective October 1, 1992.)

A D D E N D U M B

STATE of Utah, Plaintiff and Appellee,
v.
Micheal D. PRICE, Defendant and Appellant.

No. 910111-CA.

Court of Appeals of Utah.

July 23, 1992.

Defendant was convicted in the Third District Court, Salt Lake County, J. Dennis Frederick, J., of aggravated assault, and he appealed. The Court of Appeals, Billings, Associate P.J., held that: (1) guilty plea was voluntary, and (2) motion to withdraw guilty plea was untimely.

Affirmed.

Bench, P.J., concurred specially and filed statement.

[1] CRIMINAL LAW ⇨ 1028

110k1028

Defendant who fails to bring an issue before the trial court is barred from asserting it initially on

[2] CRIMINAL LAW ⇨ 1028

110k1028

Appellate court may address issue for first time on appeal if trial court committed plain error or there are exceptional circumstances.

[3] CRIMINAL LAW ⇨ 273(4.1)

110k273(4.1)

Formerly 110k273(4)

Strict compliance with criminal procedures for guilty pleas can be accomplished by multiple means so long as record reflects that all requirements have been fulfilled. U.C.A.1953, 77-35-11(5)(g) (Repealed).

[4] CRIMINAL LAW ⇨ 273.1(4)

110k273.1(4)

Defendant's plea affidavit and plea colloquy transcript reflected that court had complied with all requirements for accepting defendant's guilty plea; trial court established that defendant understood elements of offense, and had discussed affidavit with counsel and understood it, and thus, reflected that plea was voluntary. U.C.A.1953, 77-35-11(5)(g) (Repealed).

[5] CRIMINAL LAW ⇨ 274(9)

110k274(9)

Defendant's failure to file motion to withdraw guilty plea within time period allowed by statute deprived trial court of jurisdiction to hear motion, where court had informed defendant of time limit at plea hearing. U.C.A.1953, 77-13-6(2)(b); U.C.A.1953, 77-35-11(5)(g) (Repealed).

[6] CRIMINAL LAW ⇨ 1044.2(1)

110k1044.2(1)

Although state failed to raise issue of timeliness of defendant's motion to withdraw his guilty plea before trial court, Court of Appeals could address it for first time on appeal because it presented jurisdictional question. U.C.A.1953, 77-13-6(2)(b); U.C.A.1953, 77-35-11(5)(g) (Repealed).

[7] CRIMINAL LAW ⇨ 274(3.1)

110k274

Formerly 110k274(3)

Trial court may abuse its discretion by failing to set aside guilty plea in light of new evidence.

[8] CRIMINAL LAW ⇨ 274(8)

110k274(8)

Defendant's statements, offering pro se argument to withdraw his guilty plea that he and his neighbors believed in his innocence, were not sufficient to set aside plea on grounds of new, exculpatory evidence; defendant failed to present affidavits from potential witnesses or even a plausible version of the facts more favorable to him. U.C.A.1953, 77-35-11(5)(g) (Repealed).

*579 Ronald S. Fujino, Salt Lake City, for defendant and appellant.

R. Paul Van Dam and Marian Decker, Salt Lake City, for plaintiff and appellee.

Before BENCH, BILLINGS and GREENWOOD, JJ.

BILLINGS, Associate Presiding Judge:

Defendant Micheal Dean Price appeals the trial court's denial of his pro se motion to withdraw his guilty plea to a charge of attempted aggravated assault, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-4-101 and -102(4) (1990). We affirm.

FACTS

Defendant was arrested and charged with aggravated assault, a third-degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), resulting from a domestic dispute. On December 18, 1990, pursuant to a plea agreement, defendant pleaded guilty to the reduced charge of attempted aggravated assault, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-4-101 and 102(4) (1990).

During the plea proceeding, defendant's counsel informed the court he had discussed the entry of a guilty plea with defendant "on numerous occasions" and was persuaded that defendant comprehended "the effect and meaning" of such a plea. Defendant also stated he had consulted *580 with his counsel and understood the guilty plea.

In connection with his guilty plea, defendant executed a "Statement of Defendant." This affidavit indicated that defendant's plea was made "voluntarily," defendant understood the "nature and elements" of attempted aggravated assault, and defendant waived certain enumerated "statutory and constitutional rights." The affidavit also described the elements of attempted aggravated assault. Defendant informed the court he had read the affidavit, discussed it with his counsel and understood it.

The court reviewed the affidavit on the record with defendant during the plea proceeding. Specifically, the court questioned defendant about the voluntary nature of his guilty plea, the constitutional rights defendant was waiving, and defendant's understanding of the elements of attempted aggravated assault. Defendant expressed concern only about his potential sentence. In response, the court explained that, while probation was not "guaranteed," he would give "serious consideration" to the recommendations of the prosecution and the Adult Probation and Parole office. Following the plea colloquy, the court accepted defendant's guilty plea as "freely, voluntarily and knowingly executed." The court then advised defendant he had the right to move to set aside his guilty plea within thirty days.

By handwritten letter dated January 18, 1991, thirty-one days after the plea proceeding, defendant

notified the court that he wished to withdraw his guilty plea.

On January 29, 1991, immediately prior to sentencing defendant, the court heard defendant's pro se motion to withdraw his guilty plea. Although defendant was represented by counsel at this hearing, defendant argued his motion pro se because his counsel did not believe defendant had a valid reason for withdrawing his guilty plea. [FN1] Defendant asserted he was not guilty of attempted aggravated assault, and that neighbors agreed with him. The State objected to defendant's motion but presented no argument in opposition, including no claim that defendant's motion was untimely. The court denied defendant's pro se motion because defendant "established no legal reason" for the court to set aside defendant's guilty plea.

FN1. At the hearing, defendant's counsel stated: My belief is that in order to file a motion, we need to have a valid reason, so it sort of puts me at odds with Mr. Price. His expression to me was he'd changed his mind. My reading of the statute is that does not provide a reason for change of plea, but he may want to talk to you about it, but it sort of puts me in an awkward position.

On appeal, defendant claims the trial court erred by: (1) Accepting defendant's guilty plea without establishing that defendant understood the "nature and elements of the offense," thus failing to comply with Rule 11 of the Utah Rules of Criminal Procedure; and (2) denying defendant's pro se motion to withdraw his guilty plea in view of new evidence favorable to defendant and the fact that his initial plea was not voluntary. The State responds that we do not have jurisdiction of this appeal as defendant's motion to withdraw his guilty plea was untimely.

RULE 11 AND VOLUNTARY PLEA

Defendant first argues the trial court failed to comply with the requirements of Rule 11 of the Utah Rules of Criminal Procedure and the common law requirements of *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), in accepting his guilty plea. Specifically, defendant alleges the trial court failed to adequately establish that he understood the nature and elements of the offense charged and, thus, that his plea was voluntary. The State correctly contends

defendant raises these arguments for the first time on appeal.

[1][2] As a general rule, "a defendant who fails to bring an issue before the trial court is barred from asserting it initially on appeal." *State v. Archambeau*, 820 P.2d 920, 922 (Utah App.1991); accord *State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989). However, an appellate court may address an issue for the first time on appeal if: "(1) the trial court committed 'plain error,' or (2) there are 'exceptional circumstances.'" *581 *Archambeau*, 820 P.2d at 922. We find neither.

[3] In *Gibbons*, the Utah Supreme Court declared: "Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." [FN2] *Id.* at 1312. The Utah Supreme Court recently clarified the test for reviewing the validity of post-*Gibbons* guilty pleas in an advisory opinion, *State v. Maguire*, 830 P.2d 216 (Utah 1992). In *Maguire*, the supreme court stated:

FN2. Rule 11(e) has been replaced in part by Rule 11(5) of the Utah Rules of Criminal Procedure. See Utah R.Crim.P. 11 amendment notes.

We ... restate our holding that (1) strict compliance with the elements of rule 11 is required in the taking of guilty pleas and (2) said compliance may be demonstrated on appeal by reference to the record of the plea proceedings. When plea affidavits are properly incorporated in the record (as when the trial judge ascertains in the plea colloquy that the defendant has read, has understood, and acknowledges all the information contained therein), they may properly form a part of the basis for finding rule 11 compliance.

Id. at 217. The court explained the meaning of "the record of the plea proceedings" as follows:

The record before an appellate court must contain a basis for [Rule 11(5)] findings, but that record may reflect such a basis by multiple means, e.g., transcript of the oral colloquy between the court and defendant, contents of a written affidavit that the record reflects was read, understood, and acknowledged by defendant and the court, contents of other documents such as the information, presentence reports, exhibits, etc., similarly incorporated into the record, and so on.

Id. at 218. Therefore, "strict compliance can be

accomplished by **multiple means** so long as no requirement of the rule is omitted and so long as the record reflects that the requirement has been fulfilled." *Id.*

Defendant claims the trial court failed to adequately inform him of the elements of the offense charged. Specifically, defendant argues that, when he demonstrated confusion during the plea colloquy, the trial court rushed him into answering rather than clarifying his uncertainty, such that his plea was not voluntary. The record reveals that the trial court recited the facts and elements of the crime charged and asked defendant if they were correct. Initially, defendant responded affirmatively. However, when the trial court inquired again, defendant apparently hesitated. The trial court responded as follows:

Mr. Price, I'm not going to play games with you. If you want to go to trial, then we'll go to trial. I'm not going to spend the morning in here with you while you're pondering.

Now, have you made up your mind? Are you going to plead or are you not going to plead?

We'll go to trial tomorrow morning with a jury if you want that.

Defendant subsequently replied again that he wished to plead guilty.

[4] We do not find error in the trial court's acceptance of defendant's guilty plea, certainly not plain error. Our examination of both defendant's plea affidavit and the plea colloquy transcript, pursuant to *Maguire*, confirms that all of the elements of Rule 11(5) were reviewed with defendant, including his understanding of the elements of the offense. Furthermore, the trial court established that defendant had discussed the affidavit with counsel and understood it. The trial court, therefore, met its burden of ensuring that constitutional and Rule 11 requirements were satisfied. We are persuaded that defendant understood the elements of the offense with which he was charged and, thus, that his plea was voluntary.

TIMELINESS OF MOTION TO WITHDRAW GUILTY PLEA

The State argues the trial court lacked jurisdiction to consider defendant's pro se *582 motion to withdraw his guilty plea because defendant did not file his motion within thirty days of the plea

proceeding, pursuant to Utah Code Ann. § 77-13-6(2)(b) (1990), even though he was informed of the thirty-day deadline in the plea affidavit he signed and by the judge during the plea colloquy. Defendant responds that the State may not raise this timeliness issue for the first time on appeal. The State concedes the timeliness issue was not raised below but claims this question of jurisdiction may be raised at any time.

Section 77-13-6(2)(b) provides: "A request to withdraw a plea of guilty or no contest is made by motion, and shall be made within 30 days after the entry of the plea." This time limit, however, must be construed in conjunction with Rule 11 of the Utah Rules of Criminal Procedure. Rule 11(5)(g) states: "The court may refuse to accept a plea of guilty or no contest, and may not accept the plea until the court has found ... the defendant has been advised of the time limits for filing any motion to withdraw a plea of guilty or no contest." Rule 11(6) provides: "Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty or no contest is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6." Therefore, although the language of section 77-13-6(2)(b) is unconditional, it is subject to an exception incorporated within Rule 11.

Defendant's pro se motion to withdraw his guilty plea, filed thirty-one days after the entry of defendant's guilty plea, was clearly untimely. The issue before this court thus becomes whether section 77-13-6(2)(b), in view of Rule 11, presents a jurisdictional question and, thus, whether we may consider the State's untimeliness argument for the first time on appeal.

Utah's appellate courts have interpreted time limitations in the Utah Rules of Appellate Procedure similar to that imposed by section 77-13-6(2)(b) as jurisdictional. For example, Rule 4 states that a notice of an appeal as of right "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Utah R.App.P. 4(a). Despite this "jurisdictional" language, however, the rule also provides that trial courts, "upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days" after the initial thirty-day

deadline. Utah R.App.P. 4(e). Nonetheless, we have concluded Rule 4(a)'s thirty-day deadline is jurisdictional. [FN3]

FN3. See, e.g., *State v. Palmer*, 777 P.2d 521, 522 (Utah App.1989) (appellate court lacks jurisdiction to hear appeal as of right when defendant's notice of appeal is untimely and defendant failed to file a Rule 4(e) motion to extend); *In re M.S.*, 781 P.2d 1287, 1289 (Utah App.1989) (per curiam) (court remanded case to juvenile court for decision as to whether time for filing appeal may be extended under Rule 4(e) but noted "[i]f the juvenile court declines to extend the time for appeal, the appeal will be dismissed for lack of jurisdiction").

Rule 48 of the Utah Rules of Appellate Procedure also contains unconditional "jurisdictional" language qualified by an exception. It states: "A petition for a writ of certiorari must be filed with the Clerk of the Supreme Court within 30 days after the entry of the decision by the Court of Appeals." Utah R.App.P. 48(a). Nevertheless, the rule provides that the supreme court, "upon a showing of excusable neglect or good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed not later than 30 days" after the original deadline. Utah R.App.P. 48(e). The Utah Supreme Court recently interpreted this rule in *Earle v. Warden of Utah State Prison*, 811 P.2d 180 (Utah 1991). [FN4] In *Earle*, the supreme court determined it lacked jurisdiction to hear the defendant's petition for certiorari because the petition was untimely. See *id.* at 180. The court noted that, because the defendant never filed a petition for rehearing with the Utah Court of Appeals or a motion to extend the time for filing a petition to the supreme court, "the *583 time in which a petition for certiorari could be accepted by this court expired." *Id.* at 181.

FN4. The case refers to Rule 45 of the Rules of the Utah Supreme Court. However, this rule currently appears as Rule 48 of the Utah Rules of Appellate Procedure.

Although Rules 4 and 48 contain provisions which allow courts to extend the applicable filing periods under certain circumstances, Utah's appellate courts have held that such provisions do not destroy the jurisdictional nature of these time limit rules. Rather, these provisions merely permit the filing

period to be extended if a defendant complies with their requirements.

Defendant cites two recent cases from this court which he contends hold that section 77-13-6(2)(b) is not jurisdictional. In *State v. Smith*, 812 P.2d 470 (Utah App.1991), cert. denied, 836 P.2d 1383 (Utah 1992), the defendant, in September 1989, moved to withdraw his no contest plea, pursuant to section 77-13-6. See *id.* at 474. The trial court denied the motion. See *id.*

On appeal, the State argued the defendant's motion was untimely. See *id.* at 475. The State contended the April 1989 amendment to section 77-13-6, adding the thirty-day deadline for filing a motion to withdraw a guilty plea, should apply retroactively to the defendant. See *id.* This court found it unnecessary even to reach the retroactivity issue because "the State's untimeliness argument was not raised in the trial court, and was therefore not preserved for appeal." *Id.* at 476.

We followed the reasoning of *Smith* in *State v. Quintana*, 826 P.2d 1068 (Utah App.1991). In *Quintana*, the defendant appealed the denial of his motion to withdraw his guilty plea. See *id.* at 1069. The State conceded the trial court violated Rule 11 in accepting the plea but argued the thirty-day deadline of amended section 77-13-6 should apply retroactively, rendering the trial court without jurisdiction to address the defendant's motion. See *id.* Looking to *Smith*, this court noted that there "the State had failed to preserve appellant's lack of compliance with the statute as an issue to consider on appeal." *Id.* Therefore, we reversed and remanded, instructing the trial court to grant the defendant's motion to withdraw his guilty plea.

Defendant has missed the crucial distinction in these cases. Both *Smith* and *Quintana* involved defendants who pleaded guilty before the thirty-day filing deadline was added to section 77-13-6. Therefore, at the time the *Smith* and *Quintana* defendants entered their pleas, they were not informed of the thirty-day time limit for filing a motion to withdraw their pleas because there was none. Thus, the jurisdictional nature of section 77-13-6 was not triggered.

[5] In contrast, defendant in the present case was informed at the time he pleaded guilty that he had

only thirty days in which to file a motion to withdraw his plea. This is the first time this court has considered the application of the thirty-day filing period in section 77-13-6(2)(b) when the record shows that a defendant was informed of the thirty-day deadline. If the timeliness issue had been properly addressed in the trial court, that court would have been without jurisdiction to hear defendant's motion and without a basis for extending the time for defendant to file his motion. Therefore, *Smith* and *Quintana*, which focus on the retroactive application of section 77-13-6(2)(b) to defendants who were not informed of its thirty-day deadline, do not assist defendant.

Like Rules 4 and 48, the unconditional, jurisdictional nature of section 77-13-6(2)(b)'s filing deadline is not destroyed when read in light of the exception in Rule 11 allowing that deadline to be extended if a defendant has not been informed of the thirty-day time period. If a defendant is informed of the statute's thirty-day deadline for filing a motion to withdraw a guilty plea, section 77-13-6(2)(b) is jurisdictional, and a failure to file a timely motion to withdraw a guilty plea may be raised for the first time on appeal.

[6] Although the State failed to raise the issue of the timeliness of defendant's pro se motion to withdraw his guilty plea before the trial court, we may address it for the first time on appeal because it *584 presents a jurisdictional question. See *A.J. Mackay Co. v. Okla. Constr. Co.*, 817 P.2d 323, 325 (Utah 1991); *State v. Davenport*, 30 Utah 2d 298, 517 P.2d 544, 545 n. 2 (1973). We conclude the trial court properly denied defendant's motion as it was untimely.

However, even if we were to reach the merits of defendant's motion to set aside his guilty plea, we would still affirm. We have already concluded that defendant's plea was entered in compliance with Rule 11(5) and *Gibbons* and, thus, that defendant's plea was voluntary. Therefore, defendant's first ground for setting aside his plea is without merit. However, defendant also claims the trial court erred by not allowing defendant to withdraw his plea in view of new evidence favorable to defendant.

[7][8] A trial court may abuse its discretion by failing to set aside a guilty plea in light of new evidence. [FN5] In the present case, during

defendant's pro se argument to withdraw his guilty plea, defendant stated the basis for his motion was his and his neighbors' belief in his innocence.

FN5. See, e.g., *State v. Mildenhall*, 747 P.2d 422, 424 (Utah 1987) (trial court correctly denied defendant's motion to withdraw guilty plea because of the "implausible timing and suspicious content" of new evidence favorable to defendant); *State v. Gallegos*, 738 P.2d 1040, 1042 (Utah 1987) (trial court erred in denying defendant's motion to withdraw guilty plea because of "critical new evidence which cast doubt on defendant's guilt," i.e., victim's admission that her testimony at preliminary hearing wrongly implicated defendant).

On appeal, defendant argues the testimony of his neighbors presents new, exculpatory evidence. However, as the State notes, defendant fails to present affidavits from potential witnesses or even a plausible version of the facts more favorable to him. Defendant's motion was supported only by defendant's statement that he was not guilty and his self-serving conjecture that others believed him innocent. These "new" facts are not sufficient to set aside his plea.

GREENWOOD, J., concurs.

BENCH, Presiding Judge (concurring specially):

We hold in this case that the trial court lacked jurisdiction to consider defendant's motion to withdraw his guilty plea. In view of that holding, it is unnecessary (and improper) to opine about the merits of defendant's motion.

END OF DOCUMENT